Office - Supreme Court, U.S.
FILED
MAR 21 1984
ALEXANDER L. STEVAS
CLERK

Nos. 83-943, 83-1030 and 83-1119

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
*Petitioners*

v.

UNITED STATES OF AMERICA, *et al.*

---

RYDER TRUCK LINES, INC.,
*Petitioner*

v.

UNITED STATES OF AMERICA, *et al.*

---

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
*Petitioner*

v.

UNITED STATES OF AMERICA, *et al.*

---

**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

---

## REPLY BRIEF FOR THE PETITIONERS IN NOS. 83-943 AND 83-1030

---

NELSON J. COONEY
General Counsel
ROBERT A. HIRSCH
Attorney
(Counsel of Record)
AMERICAN TRUCKING ASSOCIATIONS, INC.
1616 P Street, N.W.
Washington, D.C. 20036
(202) 797-5343

[Additional Attorneys Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | i |
| REPLY ARGUMENT | 2 |
| CONCLUSION | 7 |


## TABLE OF AUTHORITIES

CASES:


| | |
|---|---|
| American Trucking Ass'ns, Inc. v. ICC, 722 F.2d 1243 (5th Cir. 1984) | 2, 3 |
| Central Forwarding, Inc. v. ICC, 698 F.2d 1266 (5th Cir. 1983) | 2 |
| Global Van Lines, Inc. v. ICC, 627 F.2d 546 (D.C. Cir. 1980) | 4, 5 |
| Mercury Motor Express, Inc. v. United States, 648 F.2d 315 (5th Cir. 1981) | 4 |
| United States v. Drum, 368 U.S. 370 (1962) | 5, 6 |


STATUTES AND REGULATIONS:


| | |
|---|---|
| National Transportation Policy, 49 U.S.C. § 10101 | *passim* |
| 49 U.S.C. § 10922(b)(1) | 3 |
| 49 C.F.R. Part 1057 | 3 |


MISCELLANEOUS:


| | |
|---|---|
| H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. (1980) | 6 |
| To Amend Title 49 of the United States Code to Eliminate Unnecessary Regulation of Motor Carriers of Property, and For Other Purposes: Hearings on S. 2245 Before the Committee on Commerce, Science and Transportation, United States Senate, 96th Cong., 2d Sess. (1980) | 6 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 83-943

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
*Petitioners*

v.

UNITED STATES OF AMERICA, *et al.*

---

No. 83-1030

RYDER TRUCK LINES, INC.,
*Petitioner*

v.

UNITED STATES OF AMERICA, *et al.*

---

No. 83-1119

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
*Petitioner*

v.

UNITED STATES OF AMERICA, *et al.*

---

**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

---

## REPLY BRIEF FOR THE PETITIONERS IN NOS. 83-943 AND 83-1030

---

Pursuant to Rule 22.5 of the Supreme Court Rules, Petitioners submit this reply brief to the arguments first raised by the government.[1]

---

[1] The separate briefs in opposition submitted by respondents Private Carrier Conference, Inc., *et al.*, Private Truck Council of

## REPLY ARGUMENT

Petitioners previously have demonstrated a conflict between the challenged decision of the Eleventh Circuit and the decision of the Fifth Circuit in *Central Forwarding, Inc.* v. *ICC*[2] (ATA Pet. 10-13). Petitioners explained how, in contrast to the Fifth Circuit's interpretation of the National Transportation Policy (NTP), 49 U.S.C. § 10101, the Eleventh Circuit ascribes to the NTP the status of independent and unfettered statutory authority. Not only did the Eleventh Circuit find the NTP to be the direct and only statutory source for the ICC's single-source lease decision in the light of purported changed circumstances,[3] but it upholds the ICC's reliance upon that policy as a mandate to foster exempt carrier competition without concern for the adverse impact of exempt carrier competition upon regulated carriers. Petitioners have further demonstrated that the Eleventh Circuit's construction of the NTP not only is contrary to the plain language of the statute,[4] but also renders superfluous the specific remedial provisions Congress enacted in the Motor Carrier Act of 1980 (MCA) to address the specific problems of exempt private carriers and owner-operators (ATA Pet. 8-9). Such a result was expressly condemned by the Fifth Circuit in *Central Forwarding* (ATA Pet. 11).

In response, the government argues that the recent Fifth Circuit decision in *American Trucking Associations,*

---

America, Inc., and the National Industrial Transportation League do not raise any arguments which are different from the government. Moreover, Petitioners initial petitions adequately address and refute the arguments they present.

[2] 698 F.2d 1266 (5th Cir. 1983).

[3] ATA App. 81a-98a. It is noteworthy that the Eleventh Circuit characterized as "not overwhelming" the ICC's evidence of changed circumstances (ATA App. 86a).

[4] By its terms, the National Transportation Policy applies to "modes of transportation subject to this subtitle," i.e., regulated carriers, 49 U.S.C. § 10101.

*Inc.* v. *ICC*,[5] rendered subsequent to the filing by Petitioners of their petitions in this Court, supports the Eleventh Circuit's reliance upon the NTP as the sole statutory provision permitting the ICC to enhance the business opportunities of exempt entities to the direct disadvantage of, and with no concern for, regulated motor carriers (Fed. Br. 16 n.14). The government's reliance on this case is mistaken.

The facts in the *ATA* case clearly are distinguishable. In that proceeding the ICC changed the proof standards to be met by a rail carrier or rail-affiliated motor carrier seeking to obtain from the ICC unrestricted motor carrier operating authority. Applicants meeting the revised standard then become regulated motor carriers and compete under the same regulatory framework as existing regulated motor carriers, including compliance with the comprehensive leasing regulations codified at 49 C.F.R. Part 1057. On these facts, the Fifth Circuit held that the NTP, when read in conjunction with the eased licensing standards enacted in section 5 of the MCA, 49 U.S.C. § 10922(b)(1), provided a rational basis for the ICC's decision to no longer require railroads to demonstrate "special circumstances" as a prerequisite to obtaining unrestricted operating authority.

In contrast, the Eleventh Circuit relied upon the NTP as the sole statutory provision authorizing the ICC's decision, even though it apparently agreed with Petitioners that the single-source leasing decision is in conflict with the Congressional policy of encouraging unregulated entities to obtain ICC operating authority, 49 U.S.C. § 10922 (ATA App. 87a). Furthermore, unlike such rail-affiliated motor carriers, owner-operators, commercial lessors and shippers operating under the ICC's single-source leasing decision will not be entering the fray of the competition in the trucking industry on the same grounds as regulated motor carriers, *cf.* 722 F.2d at 1252. Instead, as

[5] 722 F.2d 1243 (5th Cir. 1984).

wholly-exempted transportation entities they will serve only their own self interests without regard to the responsibilities imposed upon the regulated transportation system designed by Congress to meet the transport needs of the United States, including the U.S. Postal Service and the national defense.

For similar reasons, the government's reliance upon the decision of the Fifth Circuit in *Mercury Motor Express, Inc.* v. *United States*,[6] which found a rational basis for an ICC policy change permitting private carriers to obtain regulated motor carrier authority, is also misplaced. *Mercury* encourages exempt private carriers to enter into the regulated motor carrier industry, and thus furthers the regulated system by enhancing competition among similarly situated regulated carriers. In contrast, the Eleventh Circuit's decision encourages shippers, owner-operators and commercial lessors to enter into transportation arrangements to be conducted entirely outside the scope of the ICC's regulation.

Similarly, in the *Global Van Lines* case,[7] the court considered whether the ICC could, consistent with the NTP, require regulated motor carriers to pay interest on the funds of owner-operators held in carrier escrow accounts. The exercise of this power by the ICC was upheld by the court because the aim of the rules was to prevent conditions which may frustrate the success of regulation undertaken by Congress.[8] Here, however, the new policy favoring exempt carriage is facially inconsistent with the regulatory system. The new policy favors exempt carriage over regulated carriage and will result inevitably in the economic weakening of the regulated carriers upon which the vast majority of the shippers rely, especially the small shipper, to get their goods to market. Thus, although the

[6] 648 F.2d 315 (5th Cir. 1981) (Fed. Br. 17-18 n.15).

[7] Global Van Lines, Inc. v. ICC, 627 F.2d 546 (D.C. Cir. 1980) (Fed. Br. 17).

[8] *Id.* at 550-551.

court in *Global* did consider the question of whether the financial viability of owner-operators is a valid concern of the NTP, it considered it only in the context of owner-operators leased to regulated carriers and the effect of those relationships upon the success of the regulations. As is demonstrated by *Central Forwarding*, the ICC's desire to enhance the economic welfare of owner-operators does not in and of itself give the ICC *carte blanche* authority to favor exempt carriage at the expense of the regulated system.

No other court has sanctioned the direct application of the NTP to unregulated transportation without regard to the effect of the action upon the regulated system. The broad and virtually unencumbered application given the NTP by the Eleventh Circuit's decision, therefore, manifests clearly the significant national importance of this case.

Next, Petitioners wish to bring to the Court's attention an error in the government's brief. On page 13, the government argues that the ICC's new test is consistent with this Court's decision in *Drum*,[9] stating as follows:

> Although those arrangements that comply with the Commission's six minimum criteria will now create a presumption in favor of *for-hire carriage*, the lease arrangements remain, as always, subject to Commission scrutiny in the context of particular cases (emphasis added).

To the contrary, when a leasing arrangement meets the ICC's six minimum criteria, which are fraught with exceptions,[10] the presumption will be that the transportation is unregulated private carriage.

The presumption involved in *Drum* favored regulated for-hire carriage and was appropriate because it furthered the objectives of the scheme of economic regula-

---

[9] United States v. Drum, 368 U.S. 370 (1962).

[10] NARUC Pet. 11-12; Ryder Pet. 10-11.

tion of trucking.[11] Here the newly created presumption in favor of exempt carriage is directly contrary to that scheme. As pointed out in *Drum*, the goal of the regulation of motor carrier entry and rates ". . . is to assure that shippers generally will be provided a healthy system of motor carriage to which they may resort to get their goods to market." [12] That goal was not changed by the MCA. Section 3 of the MCA continues to stress the importance to the national economy and the national defense of a safe, sound, competitive, and fuel efficient *regulated* motor carrier system.[13] In the MCA, Congress simply fine-tuned that regulatory structure and then admonished the Commission "to stay within the powers specifically vested in it by the revised law." [14] Significantly, when enacting the MCA Congress specifically *rejected* an ICC request that it be granted broad general exemption powers similar to those given to the Commission in the revised legislation governing railroad transportation.[15] Thus, the creation of a presumption in favor of exempt transportation is not only inconsistent with *Drum*, but flies in the face of the Congressional intent in enacting the MCA.

Finally, the government urges the Court to ignore the Eleventh Circuit's decision in favor of future judicial review of the application of the ICC's new policy in the context of specific compliant or enforcement proceedings. This argument is specious.

---

[11] 368 U.S. at 374-375.

[12] *Id.* Exempt private carriers, however, haul only their own goods and are not available to perform transportation for "shippers generally."

[13] H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 10 (1980).

[14] *Id.* at 11.

[15] *See* To Amend Title 49 of the United States Code to Eliminate Unnecessary Regulation of Motor Carriers of Property, and for Other Purposes: Hearings on S. 2245 Before the Committee on Commerce, Science and Transportation, United States Senate, 96th Cong., 2d Sess. 1500 (1980) (Statement of Darius W. Gaskins, Jr., Chairman, Interstate Commerce Commission).

This case involves principles having widespread public importance. Through a combintaion of a presumption in favor of exempt carriage and vague standards, the challenged ICC policy as a practical matter destroys any enforceable line between regulated and exempt activities. Only four years ago, Congress undertook a major fine-tuning of federal motor carrier regulation. It preserved the basic distinction between for-hire and private carriage. If the decision of the Eleventh Circuit becomes effective, that distinction will immediately be obliterated and the Congressional policy frustrated. In these circumstances, review is appropriate now.

## CONCLUSION

Wherefore, Petitioners respectfully request that their Petitions for a Writ of Certiorari be granted.

Respectfully submitted,

NELSON J. COONEY
General Counsel
ROBERT A. HIRSCH
Attorney
(Counsel of Record)
AMERICAN TRUCKING ASSOCIATIONS, INC.
1616 P Street, N.W.
Washington, D.C. 20036
(202) 797-5343

KEVIN M. WILLIAMS
Counsel
REGULAR COMMON CARRIER CONFERENCE, INC.
1616 P. Street, N.W.
Washington, D.C. 20036
(202) 797-5269

*Attorneys for Petitioners, American Trucking Associations, Inc., Interstate Carriers Conference, Regular Common Carrier Conference, Inc., National Tank Truck Carriers, Inc., National Automobile Transporters Association, and Specialized Carriers and Rigging Association*

DONALD E. CROSS
(Counsel of Record)
THOMAS M. AUCHINCLOSS, JR.
BRIAN L. TROIANO
REA, CROSS & AUCHINCLOSS
700 World Center Building
918 - 16th Street, N.W.
Washington, D.C. 20006
(202) 785-3700
*Attorneys for Petitioner,*
*Steel Carriers' Tariff Association, Inc.*

ROBERT J. HIGGINS
JOAN M. DARBY
DICKSTEIN, SHAPIRO & MORIN
Suite 1000
2101 L Street, N.W.
Washington, D.C. 20037
(202) 828-2249
*Attorneys for Petitioner,*
*International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*
*Petitioners in No. 83-943*

JOHN C. BRADLEY
RICE, CARPENTER AND CARRAWAY
Suite 1301
1600 Wilson Boulevard
Arlington, VA 22209
(703) 522-0900
*Counsel for Petitioner*
*Ryder/PIE Nationwide, Inc.*
*(formerly Ryder Truck Lines, Inc.)*
*Petitioner in No. 83-1030*